Filed 6/6/19 P. v. Gaston CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. PAUL GASTON, Defendant and Appellant.	D074310 (Super. Ct. No. JCF38237)

APPEAL from a judgment of the Superior Court of Imperial County, Diane B. Altamirano and William D. Quan, Judges. Judgment conditionally reversed and remanded with directions.

Rachel M. Ferguson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

Following a no contest plea to one count of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)),[1] Paul Gaston filed a motion to withdraw his plea, which the trial court denied. After a delay in sentencing due to a finding that Gaston was mentally incompetent, Gaston's competency was restored, and the trial court placed Gaston on formal probation for three years.

Gaston obtained a certificate of probable cause and filed this appeal, in which he raises three contentions. First, Gaston contends that the trial court should have initiated proceedings to evaluate his mental competence due to his behavior during a hearing held one week before he entered his plea of no contest. Second, Gaston contends that the trial court abused its discretion in denying his motion to withdraw his plea. Third, Gaston argues that this matter should be remanded for the trial court to decide whether to grant pretrial diversion under newly-enacted section 1001.36, which Gaston contends applies retroactively to his case.

We conclude that Gaston's first two arguments lack merit. However, we agree that the pretrial diversion program created by section 1001.36 applies retroactively to cases such as Gaston's in which the judgment is not yet final. Accordingly, we will conditionally reverse the judgment and remand to the trial court with directions to hold a hearing under section 1001.36 to determine whether to grant diversion under that statute.

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1 Unless otherwise indicated, all further statutory references are to the Penal Code.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On August 2, 2017, Gaston entered a 7-Eleven store and asked the clerk how much a pack of cigarettes would cost.[2] The clerk told Gaston that a pack of cigarettes was $9.15, and Gaston handed the clerk a $20.00 bill. After again asking the clerk how much the cigarettes cost, Gaston became upset because he saw a sign stating that a pack of cigarettes costs $7.89. The clerk told Gaston the lower price was for two packs bought together. Gaston pulled out a pocket knife and demanded that the clerk return his $20.00. The clerk feared Gaston would harm him and returned the money.

Gaston was charged with one count of second degree robbery (§§ 211, 212.5, subd. (c)), one count of assault with a deadly weapon (§ 245, subd. (a)(1)), and one count of exhibiting a deadly weapon (§ 417, subd. (a)(1)).

On August 10, 2017, Gaston appeared in court to enter a plea before Judge Diane Altamirano. However, based on Gaston's strange statements and behavior at the hearing the trial court did not finish taking the plea. Instead, the court suspended proceedings due

2 When Gaston pled no contest, the parties agreed that the police report formed the factual basis for the plea. As the police report does not appear in the appellate record, we base our statement of the facts on the probation officer's report.

to doubts about Gaston's mental competency and ordered a mental health examination of Gaston pursuant to section 1368.[3]

On August 28, 2017, at a hearing before Judge Christopher Plourd, the court found, based on a psychologist's report that Gaston was mentally competent, and it reinstated the proceedings. The psychologist's report is based on an evaluation of Gaston on August 17, 2017. According to the report, Gaston's thought process was logical and organized, and he was able to focus and respond appropriately throughout the evaluation. The only diagnosis made by the psychologist was alcohol abuse disorder, based on Gaston's self-reporting of his daily drinking. The report concluded that Gaston was able to understand the criminal proceedings and was able to assist counsel in a rational manner.

At a hearing on September 1, 2017, before Judge Altamirano, the court considered a request by Gaston, pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), to appoint a different attorney. At the *Marsden* hearing, Gaston made several incongruous statements. First, when asked why he wanted a different attorney, Gaston stated that he could "afford one" and then stated, "also because I feel that I was drunk and on Adderall.

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[3] According to the reporter's transcript of the hearing, Gaston's statements were strange in the following respects: (1) Gaston repeatedly said the word "period" at the end of his sentences, and when asked why, he explained he included "period" because the court reporter would have to type that punctuation; (2) when asked if he wanted to accept the plea deal, Gaston said "Will this affect my marketing/management career? Whatever will get me out of here faster and not be here every day. Yes;" (3) when asked if he understood that there could be immigration consequences from his plea, Gaston said, "Will I be able to go back to the United Kingdom, Yorkshire?" and (4) when asked if he understood the *Cruz* waiver, Gaston replied in both Spanish and English, "Si, yes." At that point, the trial court suspended the proceedings.

And I have someone I can give up in order for a lesser time," referring to the person who supplied him with Adderall. When defense counsel explained to the court that, based on his understanding, Gaston did not have adequate funds to hire an attorney, Gaston stated that he had $350 in his Wells Fargo account. Next, Gaston returned to the idea that he was drunk during the crime, confusingly stating "Well, I didn't do it because I was drunk. I did it because I was drunk." Gaston also explained that he wanted to subpoena the 7-Eleven clerk, explaining he wanted to "tell him I'm sorry to his face so I can have a job, and I want to have a career." While defense counsel was explaining to the court that he had spoken to Gaston and told him that instead of subpoenaing the victim to apologize, it was more appropriate to address the victim at the sentencing hearing, Gaston interrupted and said, "Why is my mom not here?" Gaston continued, "I was a foster child. You know that right? So they're basically trying to make me become a statistic because [of] something I did while I was drunk. I don't want to mess up my whole entire life because of something I did when I was dru[nk], Miss. I wanted to be a marketing manager like I said the first time. I was coherent the first time too."

After Gaston made those comments, the trial court stated, "You know, I'm concerned—" but was interrupted by defense counsel, who stated, "Well, I'm starting to have some concerns about it too, frankly, Your Honor. He seems to be—some of the speech seems kind of disjointed." The trial court then explained to Gaston that it could not give him another lawyer based on what he told the court. Gaston appeared to understand, and replied appropriately by stating, "Okay. Can you come up with a different option other than that plea? Because I don't want that plea. I don't want a

strike." Gaston said, "I'm not going to cry about it, but if I have to take a strike, I'll take a strike, but not a felony."

After concluding the private *Marsden* hearing, the trial court denied the *Marsden* motion on the record. Defense counsel then raised a concern about Gaston's mental competency. Defense counsel stated, "I have some concerns about Mister—I have been able to discuss the case, although I do have some concerns about Mr. Gaston based on his statements during the *Marsden* hearing, which seem to me to suggest to me that he cannot rationally assist me in the defense of his case." The prosecutor brought to the trial court's attention that an evaluation of Gaston's mental competency had recently been performed and that four days earlier, on August 28, 2017, the court had reinstated criminal proceedings. After reviewing the psychologist's report, which the court observed was from two weeks earlier, the court stated, "Well, why don't we just leave the date set [for the preliminary hearing on September 8, 2017,] and see how things go between now and then." While the trial court was reviewing the doctor's report, Gaston made the following statement, "I've been speaking in a psychiatric hospital. They told me if I said—when I went to El Centro Medical Behavioral Health, they said that if I wanted to—if I got into a fight or any discretion with the law, to say that I wanted to go to a psychiatric hospital. That's why I'm wearing this red. I should be in blue. So imagine me in blue right now." He continued, "I'm a loyalist fuck, through my blood."

At a hearing on September 8, 2017, again before Judge Altamirano, Gaston entered a plea of no contest. Gaston did not make any strange comments during the hearing, and he gave appropriate answers to all of the trial court's questions. The plea

agreement provided that in exchange for his plea, the imposition of Gaston's sentence would be suspended, and Gaston would be placed on formal probation for three years.

On October 23, 2017, Gaston filed a motion to withdraw his no-contest plea based on the contention that he was "psychotic and delusional" when he entered the plea. Judge Altamirano held a hearing on the motion on November 27, 2017. In support of the motion, defense counsel called Dr. Steven Charles Dilsaver as a witness. Dr. Dilsaver is a psychiatrist who treated Gaston in 2016 and last had contact with Gaston in November 2016, which was approximately a year earlier. While treating Gaston, Dr Dilsaver administered injections of psychiatric medication to Gaston for a mood disorder, but Dr. Dilsaver did not know if Gaston saw another doctor or continued receiving medication after November 2016. Dr. Dilsaver acknowledged that he had no idea what Gaston's mental condition was when he entered his plea on September 8, 2017. At the hearing, defense counsel argued that Gaston had "mental defenses" to the robbery charge, but Gaston did not understand his defenses when he entered the plea. Defense counsel argued that it would not be "right for him to be convicted with his mental state with what we know—what we've seen."

Throughout the hearing, Gaston made inappropriate and vulgar outbursts and was eventually removed from the courtroom. The trial court denied the motion to withdraw the plea, but based on Gaston's behavior at the hearing, it suspended further proceedings and ordered a psychiatric evaluation pursuant to section 1368. In ruling on the motion, the trial court considered Dr. Dilsaver's testimony, reviewed the psychologist's report from August 2017 that found Gaston to be mentally competent, and recalled that Gaston

acted appropriately while entering the plea on September 8, 2017. The trial court stated, "I think the . . . legal issue in this case . . . is whether . . . there's good cause to withdraw the plea that was entered on September 8th, and I think this case is wrought with problems in terms of [Gaston's] mental state at the present time, but based on my own recollection of that day, together with [the psychologist's] report, I don't think there's good cause to withdraw the plea, but I do want to send him for a [section] 1368 evaluation because I do not think he's competent at this time." The trial court explained, "If the issue were what his competency is today and that were somehow able to relate back to that date [of September 8, 2017,] in a more connected manner, I maybe could've done something else, but I just don't feel like I can."

On February 7, 2018, based on two reports evaluating Gaston's mental competence, the trial court found that Gaston was not competent. The court further found that Gaston had a chronic psychiatric condition and ordered the administration of psychiatric medication.

The first report, by the same psychologist who evaluated Gaston in August 2017, concluded based on an evaluation performed on December 7, 2017, that Gaston suffered from schizoaffective disorder with hypomanic characteristics. During the evaluation, Gaston was unable to understand questions or to respond appropriately, and his thought process was illogical and disorganized. The psychologist concluded that Gaston was unable to understand the purpose of the criminal process or to assist counsel in presenting a defense in a rational manner.

The second report, by a psychiatrist, was based on an evaluation of Gaston on January 8, 2018. The report stated that Gaston's thought process was disorganized, tangential and had flight of ideas, and that Gaston reported hearing voices and had grandiose delusions. The psychiatrist diagnosed Gaston with schizoaffective disorder, bipolar type.

On June 18, 2018, the Medical Director of the Metropolitan State Hospital filed a certification with the trial court stating that Gaston had been restored to competency. At a hearing on June 27, 2018, the trial court found that Gaston's competence had been restored, and it reinstated criminal proceedings.

On July 2, 2018, the trial court held a sentencing hearing. As agreed to in Gaston's plea, the trial court suspended imposition of sentence and placed Gaston on three years formal probation.

The trial court granted a certificate of probable cause for Gaston to appeal matters going to legality of his no-contest plea, and Gaston filed a notice of appeal.

II.

DISCUSSION

A. *The Trial Court Did Not Err in Failing to Declare a Doubt as to Gaston's Mental Competence at the September 1, 2017* Marsden *Hearing*

Gaston's first contention is that the trial court erred in not declaring a doubt regarding his competence at the *Marsden* hearing on September 1, 2017. According to Gaston, although he had been declared competent a week earlier based on a recent psychologist's report, his behavior at the *Marsden* hearing "was substantial evidence of

both mental incompetency and a change in circumstances from the earlier report so as to have warranted initiation of proceedings under section 1368." Gaston argues that we should accordingly vacate the plea, which occurred a week after the *Marsden* hearing.

" ' "Both the due process clause of the Fourteenth Amendment . . . and state law prohibit the state from trying or convicting a criminal defendant while he or she is mentally incompetent. [Citations] A defendant is incompetent to stand trial if he or she lacks a ' "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—[or lacks] . . . a rational as well as a factual understanding of the proceedings against him." ' " ' " (*People v. Mai* (2013) 57 Cal.4th 986, 1032 (*Mai*).)[4] "Under both the federal Constitution and state law, the trial court must suspend criminal proceedings and conduct a competency hearing if presented with substantial evidence that the defendant is incompetent." (*Mai*, at p. 1032.) "In this context, substantial evidence means evidence that raises a reasonable doubt about the defendant's ability to stand trial." (*People v. Ramos* (2004) 34 Cal.4th 494, 507.)

As relevant here, "[i]f, after a competency hearing, the defendant is found competent to stand trial, a trial court may rely on that finding unless the court ' "is presented with a substantial change of circumstances or with new evidence' casting a serious doubt on the validity of that finding.' " (*People v. Rodas* (2018) 6 Cal.5th 219, 231 (*Rodas*).) " '[A] trial court must always be alert to circumstances suggesting a

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4 Similarly, as defined by statute, a defendant is mentally incompetent "if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a).)

change that would render the accused unable to meet the standards of competence to stand trial.' " (*People v. Mendoza* (2016) 62 Cal.4th 856, 884 (*Mendoza*).) "[U]pon the presentation of substantial evidence showing a substantial change of circumstances or new evidence giving rise to a serious doubt about the validity of the original competency finding, regardless of the presence of conflicting evidence, the trial court must hold a subsequent competency hearing. This substantial evidence standard of proof is the same standard applied by the trial court in determining whether an original competency hearing should be held." (*People v. Kaplan* (2007) 149 Cal.App.4th 372, 376.)

"[W]hen . . . a competency hearing has already been held, the trial court may appropriately take its personal observations into account in determining whether there has been some significant change in the defendant's mental state." (*People v. Jones* (1991) 53 Cal.3d 1115, 1153; see also *Mendoza*, *supra*, 62 Cal.4th at p. 890 [noting that "the trial court was in a position to determine from its own observations ever since the preliminary examination, including presiding over the competency proceedings, that the proffered new evidence of defendant's incompetence during trial, including his weeping, irrationality, and the reported lack of engagement in his own defense, were not indicators of a change but were consistent with behaviors and the evidence of incompetence that had been considered at the competency trial"].) "[T]he duty to suspend is not triggered by information that substantially duplicates evidence already considered at an earlier, formal inquiry into the defendant's competence; when faced with evidence of relatively minor changes in the defendant's mental state, the court may rely on a prior

competency finding rather than convening a new hearing to cover largely the same ground." (*Rodas, supra,* 6 Cal.5th at pp. 234-235.)

When the trial court is presented with substantial evidence of incompetence, it has *no discretion to exercise,* and it must, *as a matter of law,* initiate proceedings to determine whether the defendant is currently competent to stand trial. (*Mai, supra,* 57 Cal.4th at p. 1033 [trial court has discretion to decide against a competency hearing only "absent a showing of 'incompetence' that is 'substantial' as a matter of law"]; *People v. Welch* (1999) 20 Cal.4th 701, 738 ["once the accused has come forward with *substantial evidence* of incompetence to stand trial" the trial judge "has no discretion to exercise"].)

"On review, our inquiry is focused not on the subjective opinion of the trial judge, but rather on whether there was substantial evidence raising a reasonable doubt concerning the defendant's competence to stand trial." (*People v. Mickel* (2016) 2 Cal.5th 181, 195.) Therefore, the question before us is whether there was any new evidence or change of circumstance presented to the trial court constituting substantial evidence of Gaston's incompetence to stand trial. If such evidence exists, we must conclude that the trial court erred in refusing to initiate proceedings to determine Gaston's competence.

In this case, Gaston contends that his behavior at the *Marsden* hearing was a new circumstance constituting substantial evidence that he was incompetent. As we will explain, in light of the history of the trial court's interactions with Gaston and the psychologist's evaluation of Gaston two weeks prior to the *Marsden* hearing, which found Gaston to be mentally competent, the trial court properly concluded that Gaston's

behavior did not present a new circumstance constituting substantial evidence that Gaston was mentally incompetent.

As an initial matter, we observe that on August 10, 2017, Gaston appeared before Judge Altamirano to enter a plea. Based on Gaston's strange statements, Judge Altamirano declared a doubt as to Gaston's competency and ordered an evaluation.

Three weeks after the August 10th hearing and two weeks after the psychologist's evaluation finding Gaston to be competent, Judge Altamirano held a *Marsden* hearing and was again confronted with strange statements by Gaston. As we have described, Gaston advanced the idea that he wanted to hire a lawyer for $350, wanted to obtain a plea deal with a favorable sentence by turning in his Adderall dealer, wanted to subpoena the victim so he could apologize, and repeatedly explained that he was drunk during the crime. A few of Gaston's statements were even more bizarre, such as asking why his mother was not there, explaining that he was wearing red instead of blue because he was told to ask to go to a psychiatric hospital if he got arrested, and stating that he was "a loyalist fuck, through my blood."

However, based on its history of observing Gaston at the August 10, 2017 hearing, along with its review of the psychologist's report based on the August 17, 2017 evaluation of Gaston, the trial court reasonably could conclude that there had not been a change in circumstances constituting substantial evidence that Gaston may have become mentally incompetent. Significantly, at the August 10, 2017 hearing, Gaston made strange statements similar to the type of strange statements he made at the *Marsden* hearing. Among other things, on August 10th, Gaston stated the word "period" at the end

of his sentences for the benefit of the court reporter; he stated he was taking the plea deal because he wanted to do "[w]hatever will get me out of here faster and not be here every day;" and he asked "[w]ill I be able to go back to the United Kingdom, Yorkshire?" as a result of his plea, even though there is no indication in the record that Gaston is from the United Kingdom. Based on the fact that Gaston had been evaluated by a psychologist and found to be competent around the time that he exhibited strange behavior on August 10, 2017, the trial court could logically conclude that Gaston's *continued* exhibition of a *similar* type of strange behavior at the *Marsden* hearing should not be interpreted as behavior indicating that Gaston met the requirements to be found mentally incompetent to stand trial.[5] In short, because the nature of Gaston's behavior that the trial court witnessed did not significantly change between the August 10th and September 1st hearings, and Gaston had been found by a psychologist to be mentally competent in the interim, the trial court properly could conclude that there were no change in circumstances constituting substantial evidence that Gaston had recently become incompetent.

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[5] In contrast, the behavior that Gaston later exhibited at the November 27, 2017 hearing on his motion to withdraw his no-contest plea was of an entirely different nature than his strange comments at the August 10 and September 1, 2017 hearings. During the November 27, 2017 hearing, Gaston made repeated rude, vulgar and inappropriate outbursts, some of which were sexual comments directed at the trial court judge. Thus, due to the radically different types of inappropriate behavior at issue, the fact that the trial court declared a doubt as to Gaston's mental competency on November 27, 2017, has no relevance to the issue of whether the trial court also should have earlier declared a doubt as to Gaston's mental competence at the September 1, 2017 *Marsden* hearing.

Moreover, a person is incompetent to stand trial " ' "if he or she lacks a ' "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—[or lacks] . . . a rational as well as a factual understanding of the proceedings against him." ' " ' " (*Mai*, *supra*, 57 Cal.4th at p. 1032.) The trial court reasonably could conclude that based on Gaston's statements at the *Marsden* hearing, Gaston did not give any indication that he was unable to consult rationally with his lawyer or that he was unable to understand the proceedings. On the contrary, even though Gaston made several strange statements, other things he said indicated that he had an understanding of the nature of the proceedings and was able to rationally discuss them and advocate for his interests. Gaston's comments throughout the *Marsden* hearing show that he understood that he was being offered a plea deal that would result in a conviction for a strike under the Three Strikes law. Gaston was concerned about accepting a deal that would result in a strike, and he wanted to find some way to avoid that consequence. Gaston suggested that if he obtained a different attorney who agreed with his strategy, he might achieve a better deal by offering up his Adderall dealer to the People for prosecution. Gaston also appears to have believed that if he subpoenaed the victim to apologize he could show remorse and get a better plea deal. Finally, when the trial court denied the *Marsden* motion, Gaston appealed directly and rationally to the court to request the court's assistance in arranging a plea deal that would not result in a strike. He coherently asked the trial court, "Can you come up with a different option other than that plea? Because I don't want that plea. I don't want a strike." Evaluating the totality of Gaston's statements, although we acknowledge that some of Gaston's comments show a

serious misunderstanding about how plea bargaining works in the criminal justice system, his focus on obtaining a better plea deal demonstrates that he understood what was at stake in his case and that he was able to have a coherent discussion about it. The trial court thus reasonably concluded that Gaston's behavior at the *Marsden* hearing did not raise a doubt about whether he was able to assist his counsel in a rational manner and to understand the proceedings.

On appeal, Gaston makes much of the fact that defense counsel expressed concern at the *Marsden* hearing that Gaston may be unable to assist in a rational manner in the defense of his case. Although counsel's opinion on a defendant's competence is not substantial evidence in and of itself, it may be further relevant evidence supporting the request that the trial court initiate proceedings to determine a defendant's mental competence. (*Mai, supra,* 57 Cal.4th at p. 1033 ["[c]ounsel's assertion of a belief in a client's incompetence is entitled to some weight" but "does not, in the absence of substantial evidence to that effect, require the court to hold a competency hearing"].) Here, although defense counsel stated that he was concerned about Gaston's ability to rationally assist in his defense, defense counsel made clear that his belief was based on Gaston's behavior at the *Marsden* hearing. Indeed, defense counsel stated that *prior* to the *Marsden* hearing, he "[*had*] been able to discuss the case" with Gaston. (Italics added.) Because the trial court and defense counsel both witnessed the same behavior from Gaston at the *Marsden* hearing, the trial court was not required to give any extra weight to defense counsel's statement that he was concerned about Gaston's mental competence based on Gaston's statements in court. The trial court could reasonably make

its own assessment of what Gaston's statements revealed about his possible mental incompetence.

Gaston also contends that the trial court erred in failing to declare a doubt as to Gaston's mental competence because it stated that it was "concerned" during the *Marsden* hearing. However, as the People correctly point out, the trial court never stated that it was concerned that Gaston might be mentally incompetent. Instead, defense counsel cut off the trial court when it started to say, "You know, I'm concerned—" by stating that he too was "starting to have some concerns" because "some of the speech seems kind of disjointed." Although it is clear from defense counsel's interjection that he assumed the trial court was going to express a concern about Gaston's mental competence, it is possible that the trial court was going to make a statement about some other concern, such as about Gaston's inability to hire a new attorney for $350. In any event, even if the trial court intended to express a concern about Gaston's mental competence when it said, "You know, I'm concerned—" that statement was made *before* the trial court was informed that a psychologist had recently evaluated Gaston and found him to be competent and before it reviewed the psychologist's report. Accordingly, any preliminary concern the trial court had about Gaston's mental competence reasonably could have been dispelled by its review of the recent psychologist's report.

Finally, Gaston argues that the trial court should have recognized that his strange behavior at the *Marsden* hearing was evidence of mental incompetence despite the psychologist's evaluation because people with schizoaffective disorder experience " 'good' days" and " 'bad days,' " and Gaston must have been having a good day when he

was evaluated. However this argument overlooks the fact that at the time of the *Marsden* hearing, the only diagnosis in the psychologist's report was alcohol use disorder. Because the diagnosis of schizoaffective disorder was not presented to the trial court until much later when the evaluations of Gaston filed with the court in early 2018 made that diagnosis, we do not consider that diagnosis in determining whether the trial court should have declared a doubt about Gaston's mental competence in September 2017. (*People v. Panah* (2005) 35 Cal.4th 395, 434, fn. 10 ["We do not review the propriety of the trial court's competency ruling based on evidence that was not presented to it at the time it made that ruling."].)

In sum, we conclude that the trial court reasonably concluded that there had not been a change of circumstances at the September 1, 2017 *Marsden* hearing presenting substantial evidence that Gaston may be mentally incompetent to stand trial.

B. *The Trial Court Did Not Abuse Its Discretion in Denying Gaston's Motion to Withdraw His Plea*

Gaston next contends that the trial court abused its discretion in denying his motion to withdraw his plea of no contest. According to Gaston, he should have been permitted to withdraw the plea because there was evidence that he was not mentally competent when he entered the plea.

The authority for a motion to withdraw a plea of guilty or no contest is set forth in section 1018, which provides that "[o]n application of the defendant at any time before judgment . . . , the court may, . . . for a good cause shown" permit the plea to be withdrawn. "The defendant has the burden to show, by clear and convincing evidence,

that there is good cause for withdrawal of his or her . . . plea." (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1415-1416.) "A decision to deny a motion to withdraw a . . . plea ' "rests in the sound discretion of the trial court" ' and is final unless the defendant can show a clear abuse of that discretion. [Citations] Moreover, a reviewing court must adopt the trial court's factual findings if substantial evidence supports them." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) Good cause to withdraw a plea exists only when the defendant was "operating under mistake, ignorance, or any other factor overcoming the exercise of his or her free judgment, including inadvertence, fraud, or duress." (*Breslin*, at p. 1416.) A plea may not be withdrawn simply because the defendant changed his or her mind. (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.)

As we will explain, we conclude that the trial court did not abuse its discretion in denying Gaston's motion to withdraw his plea of no contest because substantial evidence supports the trial court's finding that Gaston had not met his burden to show that he was mentally incompetent when he entered the plea.

In support of his motion, Gaston presented the testimony of Dr. Dilsaver who provided psychiatric treatment to Gaston in 2016. During his testimony, Dr. Dilsaver stated that he last had contact with Gaston in November 2016, which was 10 months before Gaston entered a plea on September 8, 2017. Dr. Dilsaver testified that he had no way of knowing Gaston's mental condition when he entered his plea, and he did not know if Gaston continued taking psychiatric medication after he stopped treating Gaston. In contrast, Judge Altamirano who presided over both the entry of the plea and the motion to withdraw the plea, was able to rely on her own memory of Gaston's behavior at the plea

hearing. As the transcript of the September 8, 2017 hearing demonstrates, Gaston did not make any strange statements during the hearing, and he responded appropriately to the trial court's inquiries while entering the plea. Further, the trial court reviewed the psychologist's report finding Gaston to be mentally competent based on an evaluation performed on August 17, 2017, which was three weeks before Gaston entered the plea.

The trial court acknowledged that although Gaston's behavior at the hearing on the motion to withdraw his plea raised doubts as to Gaston's mental competence *at that time*, Gaston did not act inappropriately during the plea hearing on September 8, 2017, and there was no other evidence that Gaston was mentally incompetent on that date. The trial court reasonably concluded that although "this case is wrought with problems in terms of [Gaston's] mental state at the present time, . . . based on my own recollection of that day, together with [the psychologist's] report, I don't think there's good cause to withdraw the plea."

Gaston focuses in his appellate briefing on the fact that he was *eventually* diagnosed with schizoaffective disorder. However, evidence of Gaston's diagnosis was not before the trial court when it ruled on Gaston's motion to withdraw because the diagnosis was contained in documents that were not submitted to the court until 2018. The trial court therefore could not have taken the later diagnosis into account in deciding whether Gaston may have been incompetent at the plea hearing.[6] Gaston also

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[6] Dr. Dilsaver was not directly asked during his testimony about the psychiatric condition for which he was treating Gaston in 2016, although he made an indirect reference to a mood disorder.

emphasizes that the trial court did not inquire during the plea hearing whether Gaston was taking any medication that might affect his ability to knowingly and voluntarily enter the plea. However, Gaston fails to explain how that inquiry would have resulted in any information that would have shed a doubt on Gaston's competency to enter the plea, as Gaston contends that his incompetence was caused by a mental illness not from the effect of any drugs or medication.

In sum, as Gaston failed to present the testimony of any expert with knowledge of his mental state on September 8, 2017, when he entered the plea, and because the trial court had the benefit of its own recollection of the plea hearing and the benefit of a psychologist's report finding Gaston competent three weeks before he entered the plea, the trial court was well within its discretion to conclude that Gaston had not shown good cause to withdraw his plea of no contest on the ground that he was mentally incompetent when he entered it.

C. *This Matter Must Be Remanded for the Trial Court to Consider Whether to Grant Pretrial Diversion Under Section 1001.36*

After Gaston was sentenced, the Legislature enacted Assembly Bill No. 1810, which added section 1001.36 to the Penal Code. (Stats. 2018, ch. 34, § 24.) It took effect immediately. (*Id.* § 37.) Section 1001.36 creates a pretrial diversion program for certain defendants who suffer from mental disorders and meet the criteria specified in the statute. (§ 1001.36, subd. (b).) If a defendant meets these criteria, the trial court may postpone criminal proceedings to allow the defendant to undergo mental health treatment. (§ 1001.36, subds. (a), (c).) If the defendant performs satisfactorily in diversion, the trial

court shall dismiss the criminal charges. (§ 1001.36, subd. (e).) Gaston contends this newly-enacted statute applies retroactively to him. (See *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).)[7] The People disagree and take the position that section 1001.36 does not apply retroactively. However, the People agree that if we conclude the statute does have retroactive application, this matter should be remanded so that the trial court may determine whether pretrial diversion is appropriate for Gaston.

In *People v. Frahs* (2018) 27 Cal.App.5th 784, 791, review granted December 27, 2018, S252220 (*Frahs*), our colleagues in Division Three of this district concluded that the pretrial diversion program set forth in section 1001.36 applies retroactively to cases that are not yet final. While recognizing that the retroactivity issue decided in *Frahs* is currently pending before our Supreme Court, we agree with the retroactivity analysis in *Frahs*, as follows:

> "In general, statutes are presumed to apply prospectively unless they state otherwise. (See § 3.) However, the presumption against retroactivity does not apply when the Legislature reduces the punishment for criminal conduct. (*In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).) The Supreme Court's reasoning in *Estrada* is that when a statute reduces or ameliorates the punishment, it is presumed that the Legislature has determined the offense no longer merits the greater punishment, and this rationale applies even if the defendant was convicted and sentenced before the statute became effective. (*Id*. at pp. 744-745, 748 ['where the amendatory statute mitigates punishment and there is no savings clause, the rule is that the amendment will operate retroactively'].)
>
> "The scope of the *Estrada* rule was recently considered in *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299 (*Lara*). In *Lara*, the

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[7] Effective January 1, 2019, the Legislature amended section 1001.36, to exclude those defendants charged with certain crimes. (See § 1001.36, subd. (b)(2)(A)-(H).) Gaston was not charged with any of the disqualifying crimes.

prosecution initially filed charges in "adult" criminal court against defendant Lara, who was 14 and 15 years old at the time of the alleged sex offenses. (*Id.* at p. 303.) But as a consequence of the intervening passage of Proposition 57, a district attorney can no longer directly file charges against juveniles in criminal court. (*Lara*, at p. 303.) As it stands now, a district attorney may seek to transfer a case from a juvenile court to an 'adult' criminal court, but the charges must first be filed in juvenile court. (*Ibid*.) It is now exclusively for the juvenile court to determine whether the minor should be transferred to criminal court. (*Ibid*.) In *Lara*, the Supreme Court held that while Proposition 57 did not mitigate punishment for any particular crime as in *Estrada*, *supra*, 63 Cal.2d 740, Proposition 57 did confer potential benefits to juveniles accused of crimes and constitutes an ' "ameliorative change[ ] to the criminal law" that ... the legislative body intended "to extend as broadly as possible." ' (*Lara*, *supra*, 4 Cal.5th at pp. 303-304, 308-309.) Thus, the Court concluded that the Legislature intended Proposition 57 to apply retroactively 'to all juveniles charged directly in adult court' such as Lara, 'whose judgment was not final at the time it was enacted.' (*Lara*, at p. 304.)

[¶] . . . [¶]

"Here, similar to Proposition 57, the mental health diversion program under section 1001.36 does not lessen the punishment for a particular crime. However, for a defendant with a diagnosed mental disorder, it is unquestionably an 'ameliorating benefit' to have the opportunity for diversion—and ultimately a possible dismissal—under section 1001.36. Further, it appears that the Legislature intended the mental health diversion program to apply as broadly as possible: 'The purpose of this chapter is to promote . . . . [¶] (a) *Increased diversion* of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety.' (§ 1001.35, subd. (a), italics added.)

"Applying the reasoning of the Supreme Court, we infer that the Legislature 'must have intended' that the potential 'ameliorating benefits' of mental health diversion to 'apply to every case to which it constitutionally could apply.' (See *Estrada*, *supra*, 63 Cal.2d at pp. 744-746.)" (*Frahs*, *supra*, 27 Cal.App.5th at pp. 790-791, review granted.)

The People contend *Frahs* was wrongly decided. They first point out that the statute by its terms enacted only a *pretrial* diversion program that is available "at any

point in the judicial process from the point at which the accused is charged until adjudication." (§ 1001.36, subd. (c).) They argue that this language shows the Legislature intended the statute to apply only where criminal proceedings had not yet resulted in a conviction, which would exclude defendants like Gaston who were convicted before the effective date of the statute. But, as *Frahs* explained, "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate. Indeed, the fact that a juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara*, *supra*, 4 Cal.5th 299, from finding that such a hearing must be made available to all defendants whose convictions are not yet final on appeal." (*Frahs*, *supra*, 27 Cal.App.5th at p. 791, review granted.)

The People's argument that pretrial diversion is available only prospectively runs counter to other accepted applications of the *Estrada* rule. For example, two new statutes that confer discretion on a trial court to strike firearm enhancements "at the time of sentencing" have, by their own terms, no application after sentencing has occurred. (§§ 12022.5, subd. (c), 12022.53, subd. (h).) But numerous courts have found that these statutes have retroactive application. (See *People v. Hurlic* (2018) 25 Cal.App.5th 50, 56 [collecting cases].) The Legislature's description of when an ameliorative change occurs procedurally (e.g., pretrial, during trial, at sentencing) does not necessarily indicate a legislative intent that such a change is not retroactive.

The People also rely on certain legislative history materials that refer to potential cost savings as a motivating factor for the enactment of section 1001.36. The materials predict that certain defendants who would otherwise be referred to state mental hospitals because they were incompetent to stand trial would enter the lower-cost mental health diversion program. The People argue that this focus on cost savings is inconsistent with an intent to apply the statute retroactively, since retroactive application would increase costs. However, the People's argument overlooks a more persuasive statement of legislative intent: the section of the statute that expressly recites the purpose of the mental health diversion program. Section 1001.35 states, "The purpose of this chapter is to promote all of the following: [¶] (a) Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety. [¶] (b) Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings. [¶] (c) Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders." Retroactive application of section 1001.36 would promote at least the first and third purposes. Cost savings are not mentioned. We therefore cannot say sufficient "contrary indications" exist that would prevent normal application of the rule that the Legislature intends ameliorative changes to extend as broadly as possible. (See *Lara*, *supra*, 4 Cal.5th at p. 308.)

For the foregoing reasons, we agree with *Frahs*. Section 1001.36 applies retroactively to defendants, like Gaston, whose cases are not yet final on appeal. (*Frahs*,

supra, 27 Cal.App.5th at p. 791, review granted.) We therefore reverse the judgment with directions for the trial court to consider diverting Gaston under section 1001.36. We express no opinion on the merits of that determination.

DISPOSITION

The judgment is conditionally reversed. The matter is remanded to the trial court with directions to hold a hearing under section 1001.36 to determine whether to grant diversion under that statute. If the trial court grants diversion, it shall proceed in accordance with that statute. If Gaston performs satisfactorily in diversion, the court shall dismiss the charges. (§ 1001.36, subd. (e).) If the trial court does not grant diversion, or it grants diversion but Gaston does not satisfactorily complete diversion (§ 1001.36, subd. (d)), then the court shall reinstate the judgment.

IRION, J.

I CONCUR:

GUERRERO, J.

HUFFMAN, Acting P.J., Concurring and Dissenting.

I concur in both the reasoning and the results in the opinion except for section II, C., entitled: "*This Matter Must Be Remanded for the Trial Court to Consider Whether to Grant Pretrial Diversion Under Section 1001.36.*" I disagree with the analysis in that section and therefore dissent.

The majority, following *People v. Frahs* (2018) 27 Cal.App.5th 784, 791, review granted December 27, 2018, S252220 (*Frahs*), have decided that the pretrial diversion system contained in Penal Code section 1001.36,[1] must be applied retroactively to this post adjudication and sentencing case. In my view *Frahs* was wrongly decided, and I will not follow it. Recently, the Fifth Appellate District Court of Appeal has filed an opinion disagreeing with *Frahs* and finding section 1001.36 does not apply to cases which have been adjudicated and sentenced prior to the effective date of the new statute.

In the published portion of its decision in *People v. Craine* (May 23, 2019, F074622) ___ Cal.App.5th ____, [2019 Cal.App. Lexis 482] (*Craine*), the Fifth District concluded section 1001.36 does not apply retroactively to convicted defendants, explaining the text and legislative history of the statute "contraindicate a retroactive intent." (*Id.* at p. *4.) Although the court concluded section 1001.36 potentially mitigates punishment for a particular class of persons, it also concluded that only those whose crimes have not yet been adjudicated fall within that class. (*Craine*, at pp. *4-5.) It concludes the primary goal of the statute is not served by retroactive application, and

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1 Statutory references are to the Penal Code unless otherwise specified.

the secondary goals of judicial economy and fiscal savings are actually thwarted by retroactive application of the statute. (*Id*. at p. *5.) It also cites to the failure of the statute to address distinctions between preconviction and postconviction dismissal of charges as weighing against retroactivity. (*Ibid*.)

The court in *Craine* reviewed law regarding retroactivity, including *In re Estrada* (1965) 63 Cal.2d 740 and *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, and it noted that the potentially ameliorative benefits of a statute are not, in themselves, dispositive of whether the statute applies retroactively. (*Craine*, *supra*, ___ Cal.App.5th ____ at p. *13.) It then turned its discussion to the statute and to *Frahs*, *supra*, 27 Cal.App.5th 784. The court recognized that section 1001.36 confers a potentially ameliorative benefit to a class of persons, and it focused on who falls within that class. (*Craine*, at p. *14.)

It considered the meaning of " 'pretrial diversion,' " which the statute defines as "the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication . . . ." (§ 1001.36, subd. (c).) The Court of Appeal was persuaded that " 'adjudication' " "is shorthand for the adjudication of guilt or acquittal." (*Craine*, *supra*, ___ Cal.App.5th ____ at p. *14.) It commented, "At most, 'adjudication' could be synonymous with the rendition or pronouncement of judgment, which occurs at the time of sentencing." (*Id*. at p. *15.) The court also pointed out that *Frahs* recognized the defendant had technically been adjudicated, but the court there concluded it was not probative because that was just a description of how a particular diversion program was ordinarily designed to operate.

(*Id*. at pp. *15-16, quoting *Frahs, supra,* 27 Cal.App.5th at p. 791.) The *Craine* court disagreed with that reasoning.

In *Craine* the court opined that the purpose of the diversion programs was to avoid trial completely, and neither that nor statutory interpretation, which required scrutiny of the statute's text, was supported by the *Frahs* reasoning. The court concluded "the prosecution phase ends with the rendition of judgment and sentencing." (*Craine, supra,* ___ Cal.App.5th ____ at p. *17.) Thus, "[p]ursuant to the Legislature's own terminology, pretrial diversion is literally and functionally impossible once a defendant has been tried, found guilty, and sentenced. Upon reaching this point of 'adjudication,' the 'prosecution' is over and there is nothing left to postpone. (§ 1001.36, subd. (c).) We see this as a clear indication the Legislature did not intend for section 1001.36 to be applied retroactively in cases such as this one." (*Craine,* at p. *17.)

The court explained that *Lara* is distinguishable because the timing requirement in the Welfare and Institutions Code did not facially preclude a retroactive application, and it found the comparison in *Frahs* to Proposition 57 to be inapt. (*Craine, supra,* ___ Cal.App.5th ____ at pp. *18-19.) It cited the preadjudicative language in section 1001.36, subdivisions (e), (g), and (h) to support its interpretation that the statute was not intended to apply retroactively. (*Craine,* at p. *20.) It noted the textual indications are consistent with the legislative history, which indicates the statute was designed to address the inability of trial courts to order mental health treatment, counseling, or medication unless the defendant is first convicted. (*Id*. at p. *22.) It also noted that mental health diversion's applicability only to less serious offenses means many defendants would be

eligible for supervised release before remand would be ordered, and because mental health services are an available option for parolees, it is not likely the Legislature intended the use of additional court resources to complete a "pretrial diversion" assessment so late. (*Id*. at pp. *23-24.)

In my view, the *Craine* decision presents the better reasoned approach to applying the new statute to cases pending on appeal. Although the facts of this case cause one to believe Gaston has some mental health issues, the question of retroactivity of legislation in criminal cases is a matter of law, not equity or sympathy. Section 1001.36 should not be retroactively applied in this case. Thus, I disagree with the majority's analysis and the disposition which remands the case to the trial court for further proceedings. I would affirm the judgment.

HUFFMAN, Acting P. J.